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STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

THOMAS J. O'BRIEN, JR.,
Plaintiff-Appellee,

v

ANN MARIE D'ANNUNZIO,
Defendant-Appellant.
/

Supreme Court No. 161335

Court of Appeals No. 347830

Oakland County Circuit Court
No. 04-693882-DC

Hon. Lisa Langston

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APPELLEE THOMAS J. O'BRIEN, JR.'S BRIEF
ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

Appellee Thomas O'Brien ("O'Brien") does not contest that this Court has jurisdiction to review Appellant Ann Marie D'Annuzio's ("D'Annunzio") application for leave to appeal from the Court of Appeals' opinion dated February 27, 2020, as the application was filed within 42 days. MCR 7.303(B)(1); MCR 7.305(C)(2). Mr. O'Brien submits this supplemental brief as ordered by the Court in its October 28, 2020 Order.

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STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court abuse its discretion by entering a temporary order suspending D'Annunzio's parenting time without first conducting an evidentiary hearing?

Defendant-Appellant answers:	Yes.
Plaintiff-Appellee answers:	No.
The Court of Appeals answered:	No.
The trial court answered:	No.

2. If the trial court did abuse its discretion by entering a temporary order suspending D'Annunzio's parenting time, was that error harmless?

Defendant-Appellant answers:	No.
Plaintiff-Appellee answers:	Yes.
The Court of Appeals answered:	Yes.
The trial court answered:	Yes.

3. Did the trial court palpably abuse its discretion by granting O'Brien sole legal and sole physical custody and by suspending D'Annunzio's parenting time subject to periodic review?

Defendant-Appellant answers:	Yes.
Plaintiff-Appellee answers:	No.
The Court of Appeals answered:	No.
The trial court answered:	No.

4. Are the trial court's findings of fact against the great weight of the evidence?

Defendant-Appellant answers:	Yes.
Plaintiff-Appellee answers:	No.
The Court of Appeals answered:	No.
The trial court answered:	No.

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INTRODUCTION

The Child Custody Act requires courts to do what is in the best interests of the child, not what is in the best interests of the parent. From the start to finish of this case, the well-being of IRDO and GADO was the only focus of the lower court's decision-making. Both the temporary and permanent orders suspending D'Annunzio's parenting time and changing custody were entered to protect the children from D'Annunzio's volatile behavior—screaming at her daughter, physically shaking her daughter, threatening her daughter with her car, securing the doors and locks with packing tape, physically ripping phones away from them in violation of court orders, and reacting aggressively toward therapists in front of the children.

While a strong relationship with both parents is presumed to be in a child's best interests, that presumption gives way when "it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." MCL 722.27a. The same is true for the presumption that an established custodial environment should be maintained. It is obviously not in the children's best interests to remain in a custodial environment that causes mental or emotional injury. The evidence of endangerment to IRDO and GADO from D'Annunzio's behavior was aplenty.

D'Annunzio claims that she was denied an opportunity to be heard at the outset and that the circuit court drew negative first impressions based on false allegations that somehow tainted the rest of the proceedings. The record shows otherwise. Initially, the court entered an ex parte order suspending parenting time based on clear and convincing evidence submitted with O'Brien's motions, as the Child Custody Act and

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Michigan Court Rules permit. When the court granted her a hearing seven days later, D'Annunzio's counsel conceded on the record that her client needed a psychological evaluation to "rehabilitate" her in light of the evidence before the court. When D'Annunzio finally moved to set aside the temporary order and requested a hearing, the court scheduled an immediate evidentiary hearing on the temporary order, but D'Annunzio stipulated to adjourn it and proceeded with a full trial two months later. She cannot now argue that she should have been heard sooner. Nor can she reasonably expect the court to leave the children at risk pending a trial.

The trial only confirmed that she was endangering the children's mental and emotional health. D'Annunzio continues to downplay or deny her behavior on appeal and blame everyone but herself for the children's desire to avoid her. But ample evidence showed that her children were frightened by her aggressive and bizarre behavior, which she exhibited both before these proceedings and in therapy sessions with the children while these proceedings were ongoing. Multiple specialists and therapists testified to this. The trial court's discrediting of her fanciful recounts—detailed below—was not bias but rather a fair and supported credibility judgment. In the end, the record shows that the trial court's decision to suspend D'Annunzio's parenting time and change custody was not violative of fact and logic, nor against the great weight of the evidence.

For these reasons, the Court should deny leave to appeal.

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STATEMENT OF FACTS

The Statement of Facts in O'Brien's answer to the application for leave to appeal provides a detailed synopsis of the course of proceedings and of D'Annunzio's multiple unsuccessful attempts at supervised parenting time and therapy for the purpose of reunification. The Court may wish to refer to that prior statement for a more detailed account of the proceedings, since only the most salient aspects of those proceedings are restated here. The main focus of this statement is to provide a summary of the evidence presented during the 9-day evidentiary hearing.

D'Annunzio exhibits excessive rage at a sleepover in July of 2017.

O'Brien and D'Annunzio are the parents of twin children but were never in a romantic relationship. (COA Op, App 001a.) They co-parented for years until the fall of 2017, when the circuit court entered the temporary order at issue in this case, followed by a more permanent order. (*Id.*, App 002a.)

In the summer of 2017, when the O'Brien and D'Annunzio's children, IRDO and GADO, were 13 years of age, D'Annunzio's disturbing behaviors and the resulting emotional trauma to the children became apparent. In early July, D'Annunzio allowed IRDO to have friends over for a sleepover. (3/20/2018 Trial Tr, App 517a.) The girls decided to play with shaving cream, something D'Annunzio had allowed them to do previously. (*Id.* at 519a.) When D'Annunzio came down and saw what they were doing, D'Annunzio lost her temper and screamed at the young girls, calling them profane names. (*Id.* at 520a.) While D'Annunzio downplayed the girls' version of the story, she admitted that she screamed at them, used

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profanity, and called them names, and that many of the girls' parents no longer allowed them to come to her house. (*Id.* at 520a-523a.) IRDO later recounted the incident to her therapist Dr. Sucher, explaining that she was scared of D'Annunzio's behavior. (10/9/2017 Dr. Sucher Notes, Trial Ex G, App 56b (admitted, see App 644a).)

D'Annunzio's daughter flees the home to a friend's yard, where D'Annunzio screams at her, prompting the owner to call police.

On August 20, 2017, D'Annunzio brought two police officers to O'Brien's house to pick up the children. (8/20/2017 Police Report, Trial Ex H, App 61b (admitted, see App 653a).) As soon as IRDO and D'Annunzio had returned home, a fight ensued and IRDO attempted to leave the house for 20 minutes as D'Annunzio blocked the entrances. (8/30/2017 O'Brien Verified Mot for Change of Custody, App 13b.) IRDO finally left the house, and walked to her friend Grace's home.

D'Annunzio followed her to Grace's house and proceeded to scream at her until Grace's mother called the police. Grace's mother informed the officers that she was scared of D'Annunzio. At trial, D'Annunzio acknowledged that Grace's mother said she was scared of her and even added that Grace's mother called her crazy. D'Annunzio nevertheless blamed O'Brien for calling the officers, denying the effects of her behavior. (3/20/2018 Trial Tr, App 537a-538a; 8/20/2017 Police Report, Trial Ex I, App 63b (admitted, see App 1222a).)

In the midst of the ordeal, D'Annunzio attempted to call IRDO's friends' parents, but they did not answer her calls. D'Annunzio proceeded to call IRDO's 13-year-old friend Abby

to inform her about what was happening with the police and her fight with IRDO. At trial, D'Annunzio denied discussing any of the incident with Abby. O'Brien's counsel played her a recording of the phone call in which she had spoken to Abby about exactly that, and her only response was that recording the call was an invasion of her privacy. Only then did she acknowledge that she had made the call and when asked *again* if she felt the call was appropriate, she was not able to give a cogent reason for why she had that conversation with Abby. (3/20/2018 Trial Tr, App 537a-539a.)

That evening, D'Annunzio taped the door shut. It is D'Annunzio's position that she put tape, "almost like scotch tape," on the door in order to ascertain if the children were trying to "get out at night." (3/20/2018 Trial Tr, App 602a.) But the photograph of the door demonstrated that in reality D'Annunzio had taped the door in three places—including all around the door knob and over the lock—with at least five to seven pieces of clear heavy packing tape. (Photo of Door with Tape, Trial Ex F, App 55b (admitted, see App 1304a).) D'Annunzio also only taped one door, the one that would lead to the garage where the children's bikes were stored. She admitted that her house has six doors and the children could leave at night through any one of them. (3/20/2018 Trial Tr, App 603a.) The sensible explanation is that D'Annunzio was trying to tape the door shut to avoid her children being able to access their bikes. But she denied knowing whether the bikes were even in the garage. (*Id.* at 604a.)

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IRDO runs away again, and D'Annunzio's reactions turn physical.

Four days later, D'Annunzio and IRDO got into an argument and D'Annunzio attempted to take IRDO's phone from her. IRDO felt the need to leave the residence to diffuse the situation. After she left to walk to a friend's house, D'Annunzio followed her in her car to her friend's house. The CPS report reflects that D'Annunzio has used her vehicle to scare the children multiple times by speeding up and driving very close to them. (10/12/2017 CPS Investigation Report, Trial Ex Y, App 68b (admitted, see App 1417a).) Once IRDO arrived at her friend's house, D'Annunzio followed her in and yelled at IRDO in the front yard of her friend's house. There was a struggle when D'Annunzio tried to take IRDO's phone off her person by "bear hugging" IRDO. GADO recalled yelling at D'Annunzio to stop. (8/24/2017 Police Report, Trial Ex B, App 43b (admitted, see App 557a).) He reported to CPS that D'Annunzio was "shaking" IRDO. (10/12/2017 CPS Investigation Report, Trial Ex Y, App 68b (admitted, see App 1417a).)

D'Annunzio, on the other hand, testified that IRDO was just giggling, not crying, and that she did not remember GADO yelling at her to stop. (3/20/2018 Trial Tr, App 607a.) But Officer Sparks reported a story consistent with GADO's. He testified that IRDO was visibly upset when he arrived and that she expressed a rational fear of her mother. (*Id.* at 575a.) The officer indicated concern that IRDO had felt the need to leave her house to deescalate the situation with D'Annunzio. (3/20/2018 Trial Tr, App 547a-548a.)

D'Annunzio confiscates the children's phones contrary to court order, and threatens IRDO with her car as IRDO runs away from home again.

Despite the court order entered one month earlier requiring the children to have access to their phones at all times (9/13/2017 Order, App 7b), D'Annunzio took the children's phones on October 11, 2017, prompting a fight between D'Annunzio and IRDO, who ran away from home again. D'Annunzio, again, followed her in her car; this time, she sped up her car as if she was going to hit IRDO. (10/12/2017 CPS Investigation Report, Trial Ex Y, App 68b (admitted, see App 1417a).) IRDO then used a neighbor's phone to call O'Brien, who called the police, and the officers allowed IRDO to go stay with O'Brien. At this point, IRDO told the officers she no longer felt safe at her mother's house. (10/11/2017 Police Report, Trial Ex D, App 46b (admitted, see App 569a).)

The next day, officers were dispatched to the children's school because D'Annunzio arrived at the school and the children were not there. Both children did not want to go home with D'Annunzio and O'Brien told officers the children were now afraid that D'Annunzio would physically hurt them. (10/12/2017 Police Report, Trial Ex E, App 51b (admitted, see App 569a).) Officer Sweeney testified that IRDO was refusing to go home with D'Annunzio that day. (3/20/2018 Trial Tr, App 579a.) (See also Rochester Center for Behavioral Medicine Notes, Trial Ex Z, App 79b (admitted, see App 948a).)

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A CPS investigator interviews the children and later testifies she would have substantiated abuse if the circuit court had not intervened in time.

The following day, at the request of a school counselor, Jessica Spigner, a CPS investigator, went to the school to interview the children. The children described D'Annunzio as "verbally abusive" and said that her erratic behavior scared them. GADO said he does not know what sets off D'Annunzio. He also reported that D'Annunzio had become extremely angry and demanded IRDO's phone on multiple occasions. (10/12/2017 CPS Investigation Report, Trial Ex Y, App 65-66b (admitted, see App 1417a).) At trial, Spigner testified that she would have substantiated the emotional-abuse allegations had the children stayed with D'Annunzio. (6/18/2018 Trial Tr, App 791a.)

D'Annunzio and O'Brien had their first meeting with Kathleen Doan, a friend of the court ("FOC") family counselor, on October 17, and in light of the aforementioned events, the parties agreed to have a "cooling off period." (3/20/2018 Trial Tr, App 621a, 624a.)

D'Annunzio becomes hostile with the Friend of the Court.

On November 6, 2017, O'Brien and D'Annunzio met with Kathleen Doan and the meeting went poorly, to say the least. The meeting became so loud that a referee had to check on the parties and the counselor. (3/20/2018 Trial Tr, App 621a-622a.) Ms. Doan indicated in her FOC recommendation to the circuit court that D'Annunzio was "rude and confrontational." (FOC Recommendation, App 6b.) She also indicated that

D'Annunzio had to be warned several times to control herself or she would be removed from the meeting. (*Id.*) When D'Annunzio was finally asked to leave, she refused. (*Id.*) She was eventually escorted out of the building. (3/20/2018 Trial Tr, App 621a-622a.) At trial, D'Annunzio insisted that the person who escorted her out of the building was her "friend," and was simply walking her to her car. (*Id.* at 622a.)

After an ex parte order enters suspending parenting time, D'Annunzio twice puts off an evidentiary hearing on the temporary suspension and proceeds with a full trial instead.

After O'Brien filed a motion to change custody on August 28, 2017 and an emergency motion to suspend parenting time on November 6, 2017, the circuit court entered an ex parte order on November 6, temporarily suspending D'Annunzio's parenting time. (11/6/2017 Order re: Emergency Motion, App 119a.) At the hearing on that ex parte seven days later, D'Annunzio's former counsel conceded that her client had developed a "poor reputation" with the support staff and that there had been allegations of "mental illness." (11/15/2017 Hr'g Tr, App 131a-132a.) D'Annunzio's former counsel requested time to get an independent psychological assessment to "rehabilitate" her client. (*Id.*) The court agreed that would be a good idea and continued the ex parte order hearing until D'Annunzio could obtain a psychological assessment. (*Id.*; 11/15/2017 Order, App 120a.)

Through new counsel, D'Annunzio filed a motion on January 10, 2018 requesting that the temporary order be lifted or an evidentiary hearing held. (1/10/2018 D'Annunzio Mot Restore Custody & Parenting Time.) At a hearing on

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D'Annunzio's motion, the circuit court acknowledged that D'Annunzio had made "a very good argument." (1/17/2018 Trial Tr, App 1323a.) The trial judge, recognizing the importance of the matter, stated:

> I'm going to set [a] hearing on Friday afternoon. I don't care what you guys have, you're coming in here Friday afternoon and I'm going to have a hearing on parenting time and custody . . . I'm clearing my docket . . . I know there's not going to be twenty-five days of discovery, you're going to put your parties on the stand, you're going to tell me what's going on and I'm going to make a decision.

(*Id.* at 1123a-1324a.) Rather than take advantage of the expeditious hearing, D'Annunzio, with O'Brien's consent, requested an adjournment until mid-March (1/19/2018 Order, App 5b) and entered into a stipulated order on January 26, 2018 to try to resolve the dispute in the meantime (1/26/2018 Order, App 499a).

D'Annunzio becomes agitated and hostile with the family therapist, who ultimately recommends intensive therapy before any reunification.

Pursuant to the stipulated order, both parties and the children would get counseling with Katarina Popovic. (*Id.*) It did not work. The children and O'Brien liked Popovic, but disagreements arose between D'Annunzio and Popovic, and the parties moved forward with trial in late March. (Trial Ct Opinion, App 024a.)

At trial, multiple professionals testified that D'Annunzio was causing the children emotional and/or mental harm.

(Trial Ct Op, App 044a-048a, 050a-052a, 054a-055a; see testimony of CPS investigator Jessica Spigner, counselor Katarina Popovic, school counselor Anthony Flevaris, counselor Karen Davis, pediatrician Thomas Berring, therapist Linda Green.) Much of that testimony is cited in support of the factual discussion above.

The person who spent the most time with the children and saw the most interaction with D'Annunzio is Ms. Popovic. She testified that IRDO was afraid of D'Annunzio, and that IRDO was particularly fearful that D'Annunzio would be irrational with her. (6/18/2018 Trial Tr, App 952a.) She also indicated that GADO was very angry with D'Annunzio due to his protective nature over his sister. (*Id.* at 954a.) Ms. Popovic recommended that there be no reunification with D'Annunzio until she had intensive therapy, and asserted that readiness for reunification would truly depend on D'Annunzio, who was demonstrating a lot of resistance. (*Id.* at 957a-958a.)

On cross examination, Ms. Popovic admitted to not making much progress with the reunification of the children and D'Annunzio, but later went on to say that this case had much more animosity than she was used to dealing with. (*Id.* at 975a.) She testified that the children do not feel caught between their parents, but rather they are angry with D'Annunzio for assuming that O'Brien is the reason they will not live with her, rather than acknowledging her own mistakes. (*Id.* at 979a; see also Rochester Center for Behavioral Medicine Notes, Trial Ex AA, App 80b-97b (admitted, see App 65a, 948a); Rochester Center for Behavioral Medicine Notes, Trial Exhibit EE, App 98b-117b (admitted, see App 305a).)

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D'Annunzio defends herself with stories that conflict with others' testimony and witnesses who have little personal knowledge of the events above or demonstrated bias.

Apart from her own testimony, D'Annunzio offered the testimony of her mother, handyman Nathan Pour, and her ex-husband Alan Plever, all whom had spent almost no time with her and her children during the period of time encompassing the events that led to these proceedings. (Trial Ct Op, App 020a.)

The witness with the most pertinent observations in D'Annunzio's defense was Shelly Lee Lanesky. Her testimony reflected that she found IRDO to be disrespectful and did not find D'Annunzio to blame for the disagreements with her children. (10/24/2018 Trial Tr, App 1563a.) Ultimately, the court discredited her testimony due to her behavior on the stand and in the courtroom. (Trial Ct Op, App 054a.) When O'Brien's former counsel was discussing the admissibility of Ms. Lanesky's former conviction, counsel noted on the record that Ms. Lanesky was laughing. (10/24/2018 Trial Tr, App 1579a.) She antagonized O'Brien's former counsel, and the trial judge ultimately had to tell everyone to calm down. (*Id.*) During O'Brien's testimony, Ms. Lanesky was removed from the courtroom due to antagonistic gesturing and yelling. (*Id.* at 1602a-1603a.)

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A psychologist evaluates the parents and children and opines that O'Brien should continue to have full custody.

In June of 2018, the evidentiary hearing resumed for three more days of testimony. Two days after the final day of testimony, Linda Green completed her psychological evaluation of the parties. (6/22/2018 Psychological Report, App 118b.) Dr. Green ultimately concluded that the best interests of the children would be served by continued therapy for all parties, a possible modification to D'Annunzio's medication regime, and the continuation of O'Brien having full physical custody. (*Id.* at 128b.)

The parties again adjourn hearings to enter a consent order, which proves unworkable.

The parties met for one more day of witness testimony on July 11, 2018, but one week later opted to craft a consent order that permitted specific parenting time for D'Annunzio. (7/18/2018 Order, App 1b.) The Order maintained the suspension of parenting time but dictated that the children shall participate in therapy, shall meet with D'Annunzio and her mother at specified outings, shall answer D'Annunzio's texts and calls, and that the parties shall appear for a status conference in late August, among other things. (*Id.*)

Less than three weeks went by before D'Annunzio filed a motion to hold O'Brien in contempt because the children were unwilling to meet with her for her birthday and were not responding to texts or phone calls. (8/6/2018 D'Annunzio Verified Mot for O'Brien Failure to Abide by 7/18/2018 Order.) In O'Brien's response to the motion he explained that he was

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trying to work toward reunification, but the children were unwilling to communicate with D'Annunzio. (8/13/2018 O'Brien Resp to D'Annunzio Mot.) The first meeting the children had with D'Annunzio under the consent order ended with IRDO and D'Annunzio in tears. (8/6/2018 O'Brien Mot for In Camera Interview.) O'Brien moved to have the trial judge meet with the children in camera. (*Id.*)

The trial resumes and ends with the court entering an order suspending parenting time and awarding full custody to O'Brien, subject to periodic review.

At the review hearing, the trial court gleaned that therapy and the attempts at reunification were going poorly. At the September 13 status conference, the trial judge read an email sent from Ms. Popovic to Ms. Doan saying that the sessions were "unsettling for the children and unproductive." (9/13/2018 Hr'g Tr, App 155a.) At one point during a therapy session, the therapist even told D'Annunzio that she felt threatened by her. (*Id.* at 189a.) The review hearing ended with the trial court suspending parenting time again and scheduling a time to talk to the children. (*Id.* at 205a.) At that point, the circuit court decided to resume the trial. (*Id.* at 210a.)

After two more days of hearings in October of 2018, the circuit court ultimately authored an opinion granting O'Brien full physical and legal custody of IRDO and GADO, subject to periodic review. (Trial Ct Op, App 020a.)

STANDARD OF REVIEW

Three standards of review are enumerated in MCL 722.28 for child-custody cases. *Fletcher v Fletcher*, 447 Mich 871, 876;

526 NW2d 889 (1994). "[D]iscretionary rulings are reviewed under a 'palpable abuse of discretion' standard." *Id.* at 879 (citing MCL 722.28). "Findings of fact in child custody cases are reviewed under the 'great weight of the evidence' standard." *Id.* at 877-878 (citing MCL 722.28). Finally, "questions of law are reviewed for 'clear legal error.' " *Id.* at 881 (citing MCL 722.28).

ARGUMENT

This Court has asked the parties to address four issues: (1) whether the circuit court erred in entering a temporary order without an evidentiary hearing, (2) if so, whether this error was a determinative factor in the final decision, (3) whether the trial court palpably abused its discretion in granting the appellee sole legal and physical custody and suspending D'Annunzio's parenting time, and (4) whether the trial court's findings of fact were against the great weight of the evidence. The answer to each of these questions should be no.

First, the Child Custody Act and Michigan Rules of Court establish procedural rules governing when a hearing must be held prior to entering a temporary order. See MCL 722.27a(15); MCR 3.207(B), (C). But neither of them dictate when an "evidentiary" hearing must be held. They instead leave it to the court's discretion. MCR 3.210(C)(8). There was no palpable abuse of discretion here in relying on the evidence presented with O'Brien's motions when D'Annunzio was given an opportunity to respond and twice chose to defer the evidentiary hearing to a later date.

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Second, even if the circuit court somehow erred in not forcing D'Annunzio to participate in an evidentiary hearing earlier, the error is harmless. The temporary order was superseded by a final order entered after a full evidentiary hearing, and neither a delay in the hearing nor the court's temporary ruling as a determinative factor in the ultimate analysis or outcome.

Third, the circuit court did not palpably abuse its discretion by granting O'Brien sole legal and physical custody and suspending D'Annunzio's parenting time. The court found that the children suffered "significant amounts of emotional trauma" from D'Annunzio's interactions with her children not only before the motion was filed but also during her therapy sessions. D'Annunzio's arguments are largely off base, as they either have little to do with the final decision or mischaracterize the ultimate outcome of the case.

Finally, D'Annunzio has failed to identify any reversible error in the court's fact-finding. D'Annunzio argues at length that the trial court failed to properly consider the evidence she presented in support of her case, but the circuit court painstakingly went through the required analysis and was not required to opine on every piece of evidence offered by the parties. See *Fletcher*, 447 Mich at 883-884 ("the trial court's failure to address the myriad facts pertaining to a factor does not suggest that the relevant among them were overlooked"). Ultimately, D'Annunzio has failed to show that evidence as a whole "clearly preponderates" in her favor on any given finding, much less that it would change the ultimate outcome.

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I. The trial court did not palpably abuse its discretion in entering a temporary order before an evidentiary hearing was held.

Neither the Michigan Court Rules nor the Child Custody Act impose an absolute requirement to conduct an evidentiary hearing prior to entry of an ex parte or temporary order affecting parenting time or child custody. On the contrary, both the Child Custody Act and the court rules expressly permit an ex parte order to be entered without a hearing, and the court rules permit that order to automatically become a temporary order if no hearing is requested. If a hearing is requested, a hearing must be held prior to entering a temporary order, but both the Child Custody Act and the court rules leave it in the trial court's discretion to determine whether and to what extent presentation of evidence is necessary for both sides to be adequately heard.

In this case, the circuit court granted a hearing, at which time D'Annunzio's former counsel conceded that she was not prepared for an evidentiary hearing. She informed the court that D'Annunzio needed a psychological evaluation in order to contest the evidence against her. The trial court did not err at that point in entering a temporary order in reliance on the evidence that supported its ex parte order, pending a timely evidentiary hearing.

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A. An evidentiary hearing is not mandated in every case prior to entering a temporary order suspending parenting time.

Because "situations may arise in which an immediate change of custody is necessary or compelled for the best interests of the child pending a hearing with regard to a motion for a permanent change of custody," *Mann v Mann*, 190 Mich App 526, 533; 476 NW2d 439 (1991), the Michigan Court Rules permit circuit courts to enter two types of interim orders pending a full evidentiary hearing in child-custody disputes: "ex parte" orders and "temporary" orders. MCR 3.201(A)(1), 3.207.

Before entering an ex parte order, the court must be "satisfied by specific acts set forth in an affidavit or verified pleading that irreparable injury, loss, or damage will result from the delay required to effect notice, or that notice itself will precipitate adverse action before an order can be issued." MCR 3.207(B)(1). No hearing is required. See *id*. And "it will automatically become a temporary order if the other party does not file a written objection or motion to modify or rescind the ex parte order and a request for a hearing." MCR 3.207(B)(6).

A temporary order, on the other hand, "may not be issued without a hearing, unless the parties agree otherwise or fail to file a written objection or motion as provided in subrules (B)(5) and (6)." MCR 3.207(C)(2). However, " '[h]earing' in the context of subrule (C)(2) does not imply a full evidentiary hearing." *Id*. (staff comment to 1993 adoption of MCR 3.207). The trial court has discretion to determine "whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody." MCR 3.210(C)(8). The court exercises this discretion "by requiring an offer of proof or otherwise" to

determine "whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion." *Id*.

These rules are consistent with the Child Custody Act and in large part mirror its provisions. As this Court recognized in *Daly*, 501 Mich at 898, the Child Custody Act expressly authorizes trial courts to enter ex parte orders on parenting time. See MCL 722.27a(12). The same is true of temporary orders. MCL 722.27a. But nowhere does it dictate when and to what extent trial courts must hold an evidentiary hearing prior to entering such orders. MCL 722.27a. Nor does the Child Custody Act dictate when and to what extent courts must hold a hearing to enter an order affecting custody. MCL 722.27. Whether a hearing is required and to what extent are questions left to the sound discretion of the court. See *People v Franklin*, 500 Mich 92, 109-110; 894 NW2d 561 (2017) ("In general, trial courts in our state possess reasonable discretion regarding whether to hold hearings concerning the range of motions that typically come before them.").

Contradicting these rules, the Court of Appeals has said repeatedly that "[a]n evidentiary hearing is mandated before custody can be modified, *even on a temporary basis*." *Johnson v Johnson*, 329 Mich App 110, 128; 940 NW2d 807 (2019) (quoting *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005) (emphasis added in *Johnson*)). But this mantra comes from a line of case law that predates the 1993 court-rule amendment that created the procedures now established in MCR 3.207 discussed above. See MCR 3.206, .207 (1993, pre-amendment) (in Addendum); *Pluta v Pluta*, 165 Mich App 55, 59-60; 418 NW2d 400 (1987) (requiring notice and hearing before temporarily changing custody); *Mann v Mann*, 190 Mich

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App 526, 533; 476 NW2d 439 (1991) (citing *Pluta* for the same); *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999) (citing *Mann* for the same); *Grew*, 265 Mich App at 336 (citing *Schlender* for the same). Because this holding cannot be reconciled with the current version of MCR 3.207, the court rule supersedes. *People v Williams*, 483 Mich 226, 238; 769 NW2d 605, 613 (2009). That mantra is no longer good law.

In any event, the judicial system is better off under MCR 3.207. The objective of the decisions mandating a hearing had always been to ensure that the circuit court bases its custody or parenting time decision, even a temporary one, on admissible evidence and provides that the parties have an opportunity to be heard. See *Mann*, 190 Mich App at 533, 526 (holding the trial court erred in entering a temporary order based solely on an FOC recommendation); *Pluta,* 165 Mich App 60 (holding the trial court erred in entering an ex parte order without providing notice or a hearing); *Stringer v Vincent*, 161 Mich App 429, 432-433; 411 NW2d 474 (1987) (holding the court erred in deciding the issue of custody on the pleadings and the report of the FOC). "Such a determination . . . can only be made after the court has considered facts established by admissible evidence—whether by affidavits, live testimony, documents, or otherwise." *Mann*, 190 Mich App at 533.

MCR 3.207 resolves that concern by requiring a "verified pleading or affidavit" to be submitted with an ex parte motion. See MCR 3.207(B). A verified pleading is the equivalent of an affidavit, as it must be verified by "oath or affirmation of the party or of someone having knowledge of the facts stated." See MCR 1.109(D)(3); see also MCR 1.109(D)(1)(f). This ensures that the court's decision is based on evidence, but also assures that any short delays in assembling the parties and counsel to

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be heard will not deny the child necessary protection in the interim. If there are no contested issues of fact to resolve, or one of the parties is not prepared to resolve them, it is appropriate to rely on such evidence to enter the temporary order. See MCR 3.207(B)(6), (C); 3.210(C)(8). The court rule appropriately ensures the parties are given an opportunity to be heard and that the court's decision is based on evidence without "mandating" that the court hold an "evidentiary hearing" even in cases where the material facts are not contested.

To be sure, the Child Custody Act often imposes a heightened burden of proof, requiring a showing of clear and convincing evidence to suspend parenting time or change custody in some instances. See MCL 722.27, 722.27a. But even in cases where the level of proof for a final decision is "of the highest order," trial courts ordinarily have the discretion to determine the extent to which evidence must be taken:

> While recognizing that the level of proof relating to allegations of fraud is "of the highest order," we believe that the trial court itself is best equipped to decide whether the positions of the parties (as defined by the motion and response, as well as by the background of the litigation) mandate a judicial assessment of the demeanor of particular witnesses in order to assess credibility as part of the fact-finding process. Some motions undoubtedly will require such an assessment, e.g., situations in which "swearing contests" between two or more witnesses are involved, with no externally analyzable indicia of truth. Other motions will not, e.g., situations in which ascertainable material facts are

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> alleged, such as the contents of a bank account on a particular day. Where the truth of fraud allegations can be determined without reference to demeanor, we do not believe that the law requires a trial court to devote its limited resources to an in-person hearing. [*Williams*, 214 Mich App at 399.]

In sum, if the movant has presented adequate, admissible evidence in support of its motion, thus meeting the burden of proof, and the non-movant fails to object or request an opportunity to present evidence in response, entering a temporary order suspending parenting time may be entirely appropriate based on the evidence presented with the request for an ex parte or temporary order. Under those circumstances, the circuit court should not be required to engage in the meaningless exercise of holding a one-sided evidentiary hearing.

B. An evidentiary hearing is not always necessary to determine that a temporary order will not alter an established custodial environment.

In its order to file supplemental briefing, this Court cites to *Daly v Ward*, 501 Mich 897, 898; 901 NW2d 897 (2017), which cautions that a court may not enter an ex parte order (or, by implication, a temporary order) "if it also alters the child's established custodial environment without first making the findings required by MCL 722.27(1)(c)." This holding is sound, but it does not say anything about when an evidentiary hearing is necessary to make those findings, nor does it really address to the root of the problem with temporary orders in child-custody proceedings.

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The problem in *Daly*, as in most child-custody cases involving temporary orders, was not that the temporary order suspending parenting time altered the established custodial environment when it was entered, but that it did so over time, due to delay of the evidentiary hearing and final decision. The solution to that problem is not to require an evidentiary hearing prior to entering a temporary order in every case, even where it may be unnecessary, but instead to compel courts to comply with the short timelines for a final hearing and decision set forth in MCR 3.210(C) or hold the hearing sooner if necessary to avoid violating MCL 722.27(1)(c).

Under the Child Custody Act, the "established custodial environment" is not defined by where the child is physically located or who has the child in physical custody at a given point in time. It is defined by whom the child has come to rely on for support "over an appreciable time."

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

Correspondingly, a custodial environment is altered only if the child no longer naturally looks to the custodian for such support. *Pierron v Pierron*, 486 Mich 81, 86; 782 NW2d 480 (2010) ("If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established

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custodial environment will not have changed."). If it takes an "appreciable time" for the initial custodial environment to be established, logic dictates that it also takes an "appreciable time" for that custodial environment to be destroyed and a different one to become established.

It should not matter whether the short-lived interruptions occur by court order or otherwise. The focus of the analysis is on the child's circumstances, not how those circumstances arose. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). If the custodian is forced to temporarily place the child in the custody of another parent to comply with a court order, that should not be deemed to immediately alter the established custodial environment any more than if the child were voluntarily placed there so the custodian could go on vacation, or a work trip, or to the hospital to be quarantined and treated for COVID-19.

Obviously, there comes a point in time when the vacation, work trip, hospitalization, or court-ordered arrangement is so prolonged that it destroys the established custodial environment and perhaps establishes a new one. See, e.g., *Baker v Baker*, 411 Mich 567, 580-581; 309 NW2d 532 (1981) (holding that shifting the 8-year-old child's home "back and forth between Buena Vista, Colorado, and Alpena during the five and one-half months" and to multiple different residences "destroyed the previously established custodial environment in which the boy was living and precluded the establishment of a new one"). But if the established custodial environment were so fragile as to dissipate upon encountering short-lived disruptions, it would hardly qualify as "established" under the Child Custody Act. See *id*. Some degree of permanence must

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be presumed if the "barriers against removal" from that environment are to be anything but illusory. See *id*. at 577.

In *Daly*, the trial court entered an ex parte order changing custody to the defendant and then decided nine months later, after an extensive set of evidentiary hearings, that the child had an established custodial environment with the defendant and that it was in the child's best interests to grant the defendant physical custody. *Daly v Ward*, unpublished opinion of the Court of Appeals, issued April, 18, 2017 (Docket No. 333425), 2017 WL 1398760. The Court of Appeals reluctantly affirmed, holding a new custodial environment was established with the defendant because the child had lived with the defendant for nine months, even though that living arrangement resulted from the ex parte order. *Id*. at *2. This Court, in denying leave to appeal, warned "how critical it is that trial courts fully comply with MCL 722.27(1)(c) before entering an order that alters a child's established custodial environment." *Daly*, 501 Mich at 898. But query whether the circuit court could have even known the ex parte order would alter the established custodial environment when it was entered, since a new custodial environment was deemed established only based on knowledge that the arrangement had lasted nine months.

Judge Kraus unearthed this root of the problem in her concurrence in *Daly*:

> Courts have, as they should, the right to issue ex-parte orders when the need for them is shown by the petitioning party. However, courts also have an obligation in custody cases to conduct an evidentiary hearing to ensure that any changes to the

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> child's established custodial environment are warranted and in the child's best interest. In this case, there was an unjustifiable delay between the time of the ex-parte order and the evidentiary hearing. So much time had passed between the two that the circumstances evaluated to determine the established custodial environment had changed dramatically, leading the court to make a decision that if it had made directly after the ex-parte order was entered, may have been different. [*Daly,* 2017 WL 1398760, at *5.]

The question *Daly* requires circuit courts to answer—*whether* the established custodial environment would be altered—is an important question for purposes of complying with MCL 722.27(1)(c). But since a temporary order would rarely alter the established custodial environment immediately when it is entered, the better question is *when* must the final decision be issued to ensure that the temporary order will *not* alter the established custodial environment.

That brings us back to the question of whether an evidentiary hearing should be required to make this determination. The answer, again, is the same as it was above: only when there are contested issues of material fact or the evidentiary record is lacking for purposes of making that determination. In some cases, the relevant facts to determine whether an established custodial environment exists—such as the child's age, how much spent time was spent with the custodian, whether their schooling will change—will be uncontested or a matter of record. Provided the evidence before the court is sufficient to issue a temporary ruling, forcing courts to hold an evidentiary hearing when there are no contested facts or the

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non-movant is not prepared to present additional evidence will accomplish nothing but to consume judicial resources unnecessarily.

If the problem in this case is the same as the one presented in *Daly*, then the solution is to require courts to issue a final decision in a timely manner after issuing a temporary order, that is, before the temporary order results in a *de facto* alteration of the established custodial environment. The court rules already require circuit courts to complete the hearing in child-custody matters within 56 days and issue a decision within 28 days thereafter, absent good cause for an extension. MCR 3.210(C). In most cases, following this timeline should be adequate to prevent a temporary order from altering the established custodial environment of the child, in violation of MCL 722.27(1)(c), before a full evidentiary hearing is held and a decision made. See, e.g., *Pluta*, 165 Mich App at 60-61 (holding it was error to find that the established custodial environment was with the father just because mother had left the child in his temporary physical control for eight months and an ex parte order had been entered); see also *Baker*, 411 Mich at 580-581.[1]

[1] Establishing certain rebuttable presumptions based on this timeline of a similar one could be helpful in standardizing lower-court decision-making, promoting compliance with the timelines in MCR 3.210(C), and avoiding widely varying results from case to case. For instance, it could reasonably be presumed that a temporary order—even one completely suspending parenting time or changing physical custody—will not alter the established custodial environment if a final decision issues within the 3-month time frame allowed under MCR 3.210(C), unless evidence is presented to the contrary. Conversely, it could be presumed that extending the deadlines beyond those deadlines would alter the established custodial environment, absent contrary evidence.

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Prioritizing immediate appellate enforcement of those rules when circuit courts ignore them would also go a long way to ensuring the situation in *Daly* becomes an infrequent occurrence. The appellate courts could easily and rapidly rectify this sort of timing error on review of an interlocutory application for leave to appeal filed with a motion for immediate consideration. If the Court is going to impose timelines for decisions as it has in MCR 3.210, then it should not be shy about enforcing them.

As the Court noted in *Daly*, "it is [often] difficult—if not altogether impossible—to effectively remedy on appeal, and to restore the *status quo ante*, following an erroneous order altering a child's established custodial environment without causing undue harm to the child." 501 Mich at 898. But the solution is not to put children at risk by barring entry of ex parte or temporary orders necessary to protect the child until the parties and court can conduct a full evidentiary hearing under MCL 722.27(1)(c). The solution is instead to enforce the existing timelines for a final decision and allowing circuit courts the tools necessary to properly protect the emotional, mental, and physical health of the children in the interim.

Yes, that will sometimes mean that a preliminary evidentiary hearing on contested fact issues is necessary to determine whether a temporary order can be entered during that time frame without altering the established custodial environment and to determine the best interests of the child. But in many cases, the determinations can be made based on uncontested facts set forth in the parties' motions or will be evident from the record. What is critical—and required under MCR 3.207—is not an evidentiary hearing, but that the court base its decision on admissible evidence before it, after the parties have had an adequate opportunity to be heard.

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C. The trial court did not err in relying on the record evidence to temporarily suspend D'Annunzio's parenting time.

Because the decision of whether to hold an evidentiary hearing is one involving the exercise of discretion, the circuit court's decision in this case not to hold an "evidentiary" hearing prior to entering the temporary order is reviewed for abuse of discretion. See *Fletcher*, 447 Mich at 879-880. This standard is met when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgement but defiance thereof, not the exercise of reason but rather of passion or bias." *Id*. (quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959)) (internal quotes omitted).

After entering an ex parte order suspending parenting time based on the verified statements of O'Brien in his emergency motion,[2] the circuit court provided D'Annunzio an opportunity to be heard at a hearing on November 15, 2017. (11/6/2017 Order, App 119a.) She filed an answer and appeared at the hearing represented by counsel. (11/15/2017 Hr'g Tr, App 121a.) But at no point prior to or during the November 15, 2017 hearing did D'Annunzio request an opportunity to present evidence. On the contrary, she essentially declined an evidentiary hearing twice.

At the first hearing on O'Brien's temporary order request, D'Annunzio's counsel conceded that she needed time to obtain a psychological evaluation of her client to make her case. (11/15/2017 Hr'g Tr, App 128a.) After the trial judge noted her

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[2] D'Annunzio does not argue that the circuit court was required to hold an evidentiary hearing prior to entering the ex parte order.

review of the file and receiving a report from the FOC, she expressed concern at D'Annunzio's behavior and asked if counsel had anything to add on D'Annunzio's behalf. (*Id.* at 126a-127a.) At that point, counsel could have proffered the testimony of Ms. D'Annunzio to refute the evidence in the record. But she did not. Instead she argued that her client should at least have supervised parenting time, noted there had been some allegations of mental illness, and said "it might be appropriate for the Court to consider ordering Ms. Kessler to do a psych eval on [her] client to find out if, in fact, there is mental illness because . . . I have to find a way to rehabilitate . . . her, your Honor." (11/15/2017 Hr'g Tr, App 127a-128a.)

When D'Annunzio filed a motion in January to set aside the temporary order and request a hearing, the court found that D'Annunzio had made "a very good argument" and scheduled an evidentiary hearing for two days later. (1/17/2018 Trial Tr, App 1323a.) But D'Annunzio requested an adjournment of the hearing to March, with the consent of plaintiff's counsel, and at that point the parties proceeded with a full evidentiary hearing. If D'Annunzio wanted a preliminary hearing on the temporary order, in November or January, it was incumbent upon her to say so. She did virtually the opposite. "A litigant may not harbor error, to which he or she consented, as an appellate parachute." *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005).

On appeal, D'Annunzio now argues that the court's decision was erroneously based only on unsubstantiated allegations set forth in O'Brien's motion, since no testimony or evidence was presented at the hearing. But the verified pleadings signed by O'Brien under oath in his August 30, 2017 motion (8/30/2017 O'Brien Verified Mot for Change of Custody, App 16b) and

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November 5, 2017 motion (11/6/2017 O'Brien Verified Ex-Parte Motion, App 136a) are exactly the sort of evidence contemplated in the court rules, since they are the equivalent of an affidavit. See MCR 1.109(D)(3); see also MCR 1.109(D)(1)(f). If D'Annunzio's counsel had asked to cross-examine O'Brien regarding his statements in the verified motion or put her client on the stand to contest the facts averred to in O'Brien's motion, it would have been clear error for the circuit court to deny her that opportunity. But she did exactly the opposite, by conceding that a psychological evaluation was necessary and adjourning the hearing in January.

This is not a case where "[t]here was no evidence presented to the court, and, thus, the trial judge should have refused to decide the matter until the parties scheduled an evidentiary hearing or stipulated to use of the report of the friend of the court as evidence." *Stringer*, 161 Mich App at 433. This is a case where the only evidence favored suspending D'Annunzio's parenting time. Indeed, D'Annunzio does not dispute that if the facts averred by O'Brien were true, then entering a temporary order suspending her parenting time pending a hearing was justified. It would have been an abuse of discretion for the court *not* to decide at that hearing whether it should continue the suspension of parenting time based on the evidence before it. The court had an obligation to make a ruling for the sake of the children's best interests.

It was also not foreseeable at that point that the temporary order would alter the established custodial environment. The uncontested record facts were that the children were teenagers, would continue attending the same school if the parenting time were suspended, would continue living with a parent who had shared nearly equal parenting time since 2007,

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and had the means to communicate with D'Annunzio anytime they wanted to. (See 9/21/2007 Consent Order, App 38b; 8/30/2017 O'Brien Verified Mot for Change of Custody, App 9b; 11/6/2017 O'Brien Verified Ex-Parte Motion, App 136a.) The Court could easily determine from this that the temporary order suspending D'Annunzio's unsupervised parenting time would not immediately change who these 13-year-olds "naturally" looked to for support and parental comfort and that there was sufficient time to obtain a psychological evaluation.

Finally, the best interests of the children were at the very heart of this dispute, and indeed subsumed in the issue of whether D'Annunzio's parenting time was causing them emotion or mental injury. Given that the circuit court had adequate evidence in the record to be concerned that D'Annunzio's behavior was a danger to the children's emotional and mental well-being, there was no need to conduct an evidentiary hearing to gather more evidence for a best-interest-of-the-child analysis. None of the other factors in MCL 722.23 could outweigh the emotion, mental, and physical health of the children.

D'Annunzio contends that the circuit court failed to perform the analysis required, including making those determinations. But whether the circuit court erred in failing to properly lay out a thorough analysis prior to entering its temporary order is not the issue the Court asked the parties to brief. And now that a permanent order with a very detailed and thorough analysis based on nine days of testimony and numerous exhibits has superseded the temporary order, this issue is moot. *Stern v Stern*, 327 Mich 531, 534; 42 NW2d 737 (1950) (holding that when the purpose of the appeal has already been accomplished, the issue has become moot); see *Crampton v Crampton*, 178 Mich App 362, 363; 443 NW2d 419 (1989)

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(holding that an allegation of error becomes moot when the allegedly erroneous order ceases to be in effect).

II. Even if the trial court erred by not holding an evidentiary hearing earlier, the error was harmless to the ultimate outcome.

Even if the trial court should have held a hearing to take more evidence before entering the temporary order, it is not a reversible error at this point. A reviewing court may not "otherwise disturb[] a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). To be inconsistent with substantial justice and thereby warrant reversal, the error must be a "determinative factor in the court's decision." *Brugel v Hildebrant*, 332 Mich 475, 484; 52 NW2d 190 (1952). The only decision that currently has any effect on D'Annunzio's parenting time and the custody arrangement is the January 29, 2019 order, which was entered after a full evidentiary hearing and full analysis of all factors under the Child Custody Act. The temporary order no longer exists. To constitute reversible error, D'Annunzio's must demonstrate that the failure to hold a hearing prior to entering the temporary order was somehow determinative in the court's final decision.

To start, if there was error here, it was in not holding a *preliminary* evidentiary hearing before entering a temporary order. Given all of the evidence the parties had to present, it would not have been realistic to expect the circuit court or the parties to conduct a full evidentiary hearing before deciding whether to enter a temporary order. To impose such a requirement would defeat the purpose of the rules providing for such

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orders and leave children at risk of injury until a full evidentiary hearing could be held. That is not what the Child Custody Act calls for.

D'Annunzio's arguments fail to demonstrate how taking more evidence prior to a decision on the temporary order would have resulted in a different final decision after a full evidentiary hearing. Even if holding a preliminary evidentiary hearing would have meant no temporary order was entered pending a full evidentiary hearing, there is no reason to believe the evidence would have ultimately come out differently. The bulk of the evidence admitted at trial consisted of testimony and exhibits showing the emotional trauma to the children that resulted prior to her parenting time being suspended. The CPS investigator documented the abuse before the temporary order was entered. (10/12/2017 CPS Investigation Report, Trial Ex Y, App 68b.) All of that evidence would have been the same. D'Annunzio's argument that the bulk of the evidence supporting the final decision came after the temporary order is simply not accurate, as demonstrated by the statement of facts above.

Nor is there any reason to believe the decision would have come out differently either. Again, the bulk of the evidence on which the Court based its decision would have been the same, preliminary hearing or not, temporary order or not. And as the Court of Appeals correctly observed, the trial court applied the same burden of proof that would have existed if the temporary order had never been entered. (COA Op, App 005a.) The great weight of the evidence regarding events that transpired prior to November 2017 on its own showed clearly and convincingly that D'Annunzio was endangering her children's emotional well-being. The events that occurred during the proceedings

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merely confirmed that D'Annunzio was *still* a threat to her children's emotional health and was either unable or unwilling to participate in the therapy they needed to recover.

D'Annunzio argues that the outcome would have been different because the trial court was essentially biased against her based on the initial unsupported impressions. Judge Gleicher's dissent also argues that this "negative first impression" became part of the trial court's final decision. If negative first impressions are a basis for reversal, then there will hardly ever be an affirmative decision. The court has an obligation to pass judgment on the motions before it, including those that involve preliminary determinations regarding the merits of the case. Doing so is not bias, it is judgment. That judgment may be in error if entered based on allegations rather than evidence, but committing that error does not inherently invalidate later decisions that *are* made on the basis of sufficient evidence.

It certainly does not rise to the level of demonstrating a bias on its own. See *Cain v Mich Dep't of Corr*, 451 Mich 470, 496; 548 NW2d 210 (1996) ("[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." (quoting *Liteky v United States,* 114 S Ct 1147, 1155 (1994))). There is nothing more in the temporary order or hearing transcript than concerns about the behavior evidenced in the file and an initial temporary ruling—no indication of favoritism or antagonism.

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If anything, the record shows the circuit court kept an open mind after the temporary order was entered. It was quite clear in January that the circuit court was willing to change its mind when it acknowledged that D'Annunzio had made "a very good argument" and scheduled an immediate evidentiary hearing on the matter. (1/17/2018 Trial Tr, App 1323a-1324a.) It can only be presumed that D'Annunzio did not take advantage of that opportunity because she believed it was not to her benefit.

Finally, D'Annunzio argues that the temporary order and delay in an evidentiary hearing tainted the final result by damaging her bond with the children and, essentially, changed the evidentiary record for the worse (implying that the problems in therapy would not have been discovered). This is yet another example of D'Annunzio refusing to acknowledge the effects of her own frightening behavior on her children.

It is not a fair assumption that if a temporary order had not been entered that no therapy would have been ordered. It is also not a fair assumption that the therapy sessions would have gone well or that the circuit court would have held the complete evidentiary hearing before those therapy sessions fell apart. If there was a time for D'Annunzio to be on her best behavior, it was when her parenting time was suspended and she was in therapy sessions with the children. But she was still unable to control herself or refused to cooperate. It is not only speculative but unreasonable to conclude that her behavior would have been *better* and that the relationship with her children *improved* if she had been unsupervised and unconstrained in her parenting time. In sum, there is no good reason to believe the delay in a hearing and entry of a temporary order was decisive in the ultimate outcome.

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III. The trial court did not palpably abuse its discretion in suspending D'Annunzio's parenting time and granting O'Brien sole legal and physical custody.

The central issue before the trial court was whether granting O'Brien sole legal and physical custody and suspending D'Annunzio's parenting time were in the best interests of IRDO and GADO, for the sake of their emotional, mental, and physical health. Because it is presumed that a strong relationship with both parents is best, and because the child has a right to parenting time from both parents, parenting time can only be suspended when it is shown by "clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." MCL 722.27a(3). And the established custodial environment may not be altered "unless there is presented clear and convincing evidence that it is in the best interests of the child." MCL 722.27(1)(c). Ultimately, both decisions must be made based on the best interests of the child. See MCL 722.27a(1); see also MCL 722.27(1)(c). Under the Child Custody Act, discretionary rulings—such as the ultimate decision to suspend parenting time or change custody—are reviewed under a "palpable abuse of discretion" standard. *Fletcher*, 447 Mich at 879.

The trial court's conclusion that D'Annunzio's behavior posed a serious threat to the emotional stability of the children was by no means violative of fact and logic. The events leading up to the November 2017 proceedings clearly evidenced that the relationship between D'Annunzio and the children was causing the children emotional trauma. D'Annunzio's actions during the attempted therapy and reunification while the proceedings were ongoing only further reinforced the inevitable

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conclusion that suspension of parenting time (and by extension, a change of custody) was necessary for the children's best interests, particularly their emotional well-being. None of D'Annunzio's arguments on appeal alter that reality.

A. The evidence presented at trial showed that the suspension of parenting time was in the best interests of the children.

During the evidentiary hearing, the evidence showed that D'Annunzio's aggressive behavior, particularly toward IRDO, was escalating and traumatizing the children mentally and emotionally. Indeed, the events that initially triggered the dispute over custody would make a grown adult fear for their safety, much less a 13-year-old child.

It started with D'Annunzio entering such an uncontrolled rage that she screamed profane names at the young girls sleeping over in July 2017, when they "disrespected" her by making a mess with shaving cream (something D'Annunzio had allowed before). (3/20/2018 Trial Tr, App 517a-523a.) D'Annunzio's behavior after that became increasingly un-predictable and more aggressive.

On August 20, D'Annunzio used a police escort to pick up the children from O'Brien. She then got into a fight with IRDO at her home, and tried to block the exits so that IRDO could not flee. When IRDO finally left, D'Annunzio pursued her to a friend's house, and created an altercation so alarming the friend's parent summoned police. (8/20/2017 Police Report, Trial Ex I, App 63b (admitted, see App 1222a).) When IRDO finally came back home, D'Annunzio taped the garage door

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shut. (Photo of Door with Tape, Trial Ex F, App 55b (admitted, see App 1304a).)

Not even a week later, D'Annunzio's behavior turned physically violent. D'Annunzio got into another argument with IRDO and attempted to take her phone. IRDO fled D'Annunzio's house once again, only to have D'Annunzio chase her closely in a vehicle. (10/12/2017 CPS Investigation Report, Trial Ex Y, App 65b (admitted, see App 1417a).) At a friend's house, D'Annunzio attempted to wrestle the phone out of IRDO's hand, bear hugged IRDO from behind, and shook IRDO while GADO yelled at her to stop. (10/12/2017 CPS Investigation Report, Trial Ex Y, App 68b (admitted, see App 1417a).)

If D'Annunzio could control her temper, one would think she would have done so after O'Brien brought these incidents to the court's attention in August and obtained a court order. And perhaps that did have some effect for a while. But D'Annunzio continued to unravel in October of 2017, when she flagrantly ignored orders of the circuit court by taking the children's phones, prompting another fight with IRDO, who again fled on foot while D'Annunzio followed closely behind and threatened IRDO with her car. (10/12/2017 CPS Investigation Report, Trial Ex Y, App 68b (admitted, see App 1417a).) It is no wonder that the children refused to leave school with her the next day. (10/12/2017 Police Report, Trial Ex E, App 53b (admitted, see App 569a).) They both told the CPS investigator, who was called by the school counselor, that they did not want to be around D'Annunzio, finding her behavior erratic and scary. (10/12/2017 CPS Investigation Report, Trial Ex Y, App 68-69b (admitted, see App 1417a).)

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This was not ordinary behavior; it was not an isolated incident. It was instead a deeply disturbing *pattern* of behavior, which could reasonably be interpreted as an abusive situation. And indeed, that is exactly how the CPS investigator said she interpreted it; if the court had not taken early action to remove the children from the situation, she would have "substantiated" abuse. (6/18/2018 Trial Tr, App 791a.) Even psychologist Dr. Green, upon whom D'Annunzio purports to rely heavily, agreed that continued therapy was needed to achieve reunification and that O'Brien should retain full custody until that was accomplished. (6/22/2018 Psychological Report, App 128b.)

D'Annunzio had multiple opportunities to right the ship before a final order was entered in this case; indeed, that was presumably the purpose of the multiple consent orders entered by the parties. If she had exercised self-control in her meetings with Doan and with family therapists and cooperated with the therapy, perhaps the court would have reunified her with the children by now. If not, there would be a good argument the court has gone too far. But D'Annunzio either would not or could not cooperate with the therapy or even control her fury, and as a result, every attempt at reconciling her with the children resulted in further emotional trauma. She even made the FOC and the family therapist feel threatened. (9/13/2018 Hr'g Tr, App 194a; FOC Recommendation, App 6b.) After *months* of meetings, Ms. Popovic testified that she saw very little progress toward reunification due to D'Annunzio's lack of commitment with the program. (6/18/2018 Trial Tr, App 957a-958a.) Intentionally or not, D'Annunzio sabotaged her own path to reunification and made it impossible for the court to

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find a way to resolve the dispute without continuing to suspend her parenting time.

Under these circumstances, suspending D'Annunzio's parenting time and requiring her to participate in therapy was not an abuse of discretion. Whether different measures could have been taken to resolve the conflict and protect the emotional health of the children is beside the point; abuse of discretion is "far more than a difference in judicial opinion between the trial and appellate courts." *Fletcher*, 447 Mich at 879. In any event, none of the solutions that D'Annunzio offered by consent order proved workable and D'Annunzio failed to cooperate with the solution provided by the court: therapy. Every professional involved asserted that therapy was essential, and the fact that D'Annunzio did not make the therapy productive is outside the control of the circuit court. While D'Annunzio tries to blame the counselors, the circuit court, and O'Brien for the breakdown in her relationship with her children, the clear commonality is her behavior. Analyzing all of the evidence in front of it, the circuit court did not abuse its discretion by granting O'Brien sole legal and physical custody.

B. D'Annunzio's arguments do not show the court's ultimate decision to suspend parenting time and change custody was an abuse of discretion.

D'Annunzio asserts that the use of ex parte communications and the denial of a single discovery request amounts to an abuse of discretion in the way the trial court analyzed the statutory best-interests factors. However, given the strong evidence presented that sole custody with O'Brien was in the children's best interests, the use of these communications and

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the denial of the discovery request do not show that the result is "so palpably and grossly violative of fact and logic" that it mandates remand for reevaluation by the trial court. *Fletcher*, 447 Mich at 879.

1. Considering the FOC's recommendations during the proceedings did not make the end result violative of fact and logic.

As the Court of Appeals correctly explained, D'Annunzio's argument that the trial court should not have relied on the FOC's out-of-court recommendations is without merit. An FOC's report "may be considered by the trial court as an aid to understanding the issues to be resolved." *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989); see also MCL 722.27(1)(d). The Court of Appeals ultimately concluded that while it was a clear legal error to preclude the parties from reviewing the FOC report, the error was harmless because both parties had a chance to respond to the FOC recommendation at the September 13, 2018 hearing. (COA Op, App 009a; 9/13/2018 Hr'g Tr, App 170a-171a.)

Rather than point to any clear error in the Court of Appeals' conclusion or how this means the ultimate decision to suspend parenting time or change custody was an abuse of discretion, D'Annunzio has merely sided with Judge Gleicher's dissenting opinion, stating that:

> A thorough review of the record, coupled with Judge Gleicher's dissenting Opinion, undoubtedly demonstrates that these off record, hearsay communications the trial court Judge had with "her

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> family counselor" undoubtedly impacted the outcome in this case. [Appellant's Supp'l Br 19].

This Court has explained that an appellant cannot merely "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Micham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); see also *Denhof v Challa*, 311 Mich App 499, 521; 876 NW2d 266 (2015) (stating that an appellant must dispute the basis of a lower court's ruling, or a reviewing court "need not even consider granting the relief being sought by the appellant."). D'Annunzio has not explained how this makes the ultimate result violative of fact and logic, nor does she point to any flaw in the Court of Appeals' decision that doing so was harmless error. And there is no indication in the trial court's opinion that it did affect the analysis in the end.

2. The circuit court's reference to the text messages presented in a post-trial motion did not make the final decision an abuse of discretion.

D'Annunzio proceeds to argue that the trial court committed an abuse of discretion by considering text messages that O'Brien attached to a motion on November 8, 2018. D'Annunzio claims the trial court "extensively" relied on this information. The text messages were considered under factor (l) of the best-interests-of-the-child analysis, after the trial court conducted an exhaustive review of every single other best-interests factor. As the Court of Appeals correctly observed, it is overstating the case to say that these text messages were "extensively" relied upon. (COA Op, App 009a.)

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An abuse of discretion occurs when the outcome "is not within the range of reasonable and principled outcomes." *Berger v Berger*, 277 Mich App 700, 723; 747 NW2d 336 (2008). The trial court examined every single best-interest factor and determined that ten of the eleven factors were in the father's favor. The trial court cited the text messages in factor (l) as further proof that D'Annunzio fails to accept responsibility for her actions. The trial court had already arrived at this conclusion while considering factor (g) of the best-interest analysis, the mental and physical health of the parties. Even if the trial court did inappropriately consider the text messages in making the custody determination, this hardly gives rise to a finding that the inclusion of the messages caused the final result to be violative of fact and logic.

3. The denial of D'Annunzio's discovery request for Dr. Green's psychological data did not make the end result violative of fact and logic.

D'Annunzio's final argument is that denying D'Annunzio's request to compel production of the underlying test data and the computer printout from the FOC psychologist was not harmless error. The majority opinion of the Court of Appeals held that the decision was an abuse of discretion, but the error was harmless because Dr. Green's psychological data was not the decisive piece of evidence pointing to the mother's concerning behavior. (COA Op, App 013a.) D'Annunzio challenged the Court of Appeals' opinion that "it is improbable that the results of the proceedings would have been different" because the conclusion was "pure speculation." (Appellant's Supp'l Br 22.) In support of that assertion, D'Annunzio cited Judge Gleicher's dissent that opined that the trial court opinion reflected a "conclusion that D'Annunzio is seriously mentally

ill." (COA Op, dissent, App 89a.) The majority opinion has the better argument here.

Dr. Green's testimony was merely one piece of information in an enormous record that largely pointed to the conclusion that the best interests of the children were served by O'Brien having sole physical and legal custody and D'Annunzio's parenting time being suspended. As the Court of Appeals pointed out, the circuit court did not even find mental conditions reported by Green to be dispositive. (COA Op, App 013a; Trial Ct Op, App 061a.) Given that the circuit court relied on more than just Dr. Green's data to make her decision about D'Annunzio's mental health as compared to O'Brien's, the refusal of the discovery request was a harmless error.

4. The circuit court did not fail to provide D'Annunzio an opportunity for interim relief or a parent-child relationship.

Finally, D'Annunzio argues that the trial court erred in failing to modify the suspension of parenting time during the course of proceedings and failing to provide an opportunity for a parent-child relationship in its final order. Whether the trial court should have modified the temporary order during the pendency of the hearings is a moot issue at this point, as there is no relief that can be granted now that the temporary order is no longer in effect and the proceedings are over. *Contesti v Attorney Gen*, 164 Mich App 271, 278; 416 NW2d 410 (1987) ("An issue is moot where circumstances render it impossible for the reviewing court to grant any relief."). And there was no error in any event because D'Annunzio eschewed the immediate hearing in favor of starting trial in March, and the parties themselves modified the temporary order in the interim

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by consent orders multiple times. (1/26/18 Stip Order, App 495a; 7/18/2018 Consent Order, App 1b.) Though the solutions for reunification tried by the parties did not succeed, that does not provide a reason for reversal.

The assertion that the circuit court denied an opportunity for a parent-child relationship is patently untrue. The court properly made its order subject to periodic review. (Trial Ct Op, App 070a.) See *Luna v Regnier*, 326 Mich App 173, 183; 930 NW2d 410 (2018) ("While we do not believe that the trial court abused its discretion by suspending defendant's parenting time and declining to order reunification therapy, we do believe that it is necessary to remand this case and direct the trial court to conduct periodic hearings to determine whether the children wish to reinitiate contact with defendant and whether resumption of parenting time would be in their best interests."). It also said it would "not preclude mother from filing future motions seeking limited contact for specific situations, such as for those situations addressed in the court's November 22, 2017 *Additional Order Following November 15, 2017* order." (Trial Ct Op, App 072a.)

The order also permits the children's therapists to "undertake reunification methods if appropriate." (*Id*. at 073a.) It is not unreasonable to rely on professionals having the most intimate familiarity with the children's condition to discern when reunification efforts will be in the children's best interests.

Finally, the circuit court did not condition reunification on the children's willingness to reinstate contact. The opinion merely "directs the parties to praecipe the matter for periodic status conferences 'to determine whether the children wish to reinstate contact with defendant and whether resumption of

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parenting time would be in their best interests." (Trial Ct Op, App 071a.) There is nothing untoward in considering the preference of the children—it is one of the best-interests factors—and considering their preferences does not inherently mean that their preference will be treated as dispositive. Until the trial court actually does treat the children's preference as dispositive in a periodic review, the question of whether it erred in doing so is not ripe for review. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008) ("A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all.").

IV. The trial court's findings of fact are not against the great weight of the evidence.

D'Annunzio takes issue with the trial court's findings on a number of fronts. In general, D'Annunzio challenges the trial court's overall view that her behavior has a harmful impact on the children. (See Trial Ct Op, App 059a.) She also challenges the trial court's best-interests findings on a number of factors. None of her arguments show that the trial court's findings were against the great weight of the evidence.

A. The evidence does not clearly preponderate against the trial court's view that D'Annunzio's behavior harmed the children.

D'Annunzio argues that no "trial testimony" corroborated the court's findings regarding her behavior, that "every witness testified that Mother was polite, appropriate and that she did not yell," and that the trial court failed to comment on and consider her evidence that disciplinary issues and O'Brien's

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influence were to blame for all of the "discord." (Appellant's Supp'l Br 26.) These arguments are specious.

The "great weight of the evidence" standard is not satisfied by showing that there was some evidence at trial supporting one's position. Rather, the evidence *as a whole* on a particular finding must clearly "preponderate in the opposite direction." *Fletcher*, 447 Mich at 878 (quoting *Murchie v Standard Chamberlain Estate*, 298 Mich 278, 284; 299 NW 82 (1941)).

D'Annunzio cannot meet that standard by selectively pointing only to the evidence that favors her position, which is exactly what she has done. The evidence at trial includes not just the testimony of witnesses, but also the documents admitted as well, which D'Annunzio ignores. D'Annunzio merely repeats the testimony of individuals who had peaceful interactions with her and claims that the trial court did not give sufficient weight to the testimony of witnesses that weighed against O'Brien. But just because there is evidence supporting her theory does not mean that the circuit court's decision should be reversed. As Judge Murray said in his concurrence:

> [T]he dissenting opinion has one theory of the case, while the trial court had another theory of the case. Both theories have a basis in the evidence, but as set forth in the initial part of this opinion, it is not our duty as appellate judges to decide which facts are more persuasive or worthy of more weight. It is enough to say, as the majority does, that evidence supported the trial court's findings. [COA Op, Murray, J, concurring, App 137b.]

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In pointing to evidence supporting her theory, D'Annunzio has not shown that it clearly outweighs all of the other trial testimony and trial exhibits admitted at trial. The evidence presented at trial showed D'Annunzio would become so enraged as to verbally berate and even physically accost her daughter, or the multiple reports of professionals showing that her children were emotionally traumatized and feared for their safety as a result of her behavior. The fact that she was polite to a police officer or a CPS worker or the school counselor is not a basis to discount or discredit the evidence of her erratic, bizarre, and frightening behavior *toward her children*, which is the central issue here.

D'Annunzio also cannot satisfy the standard of review by arguing that the trial court failed to comment on and consider evidence favoring her story, such as evidence that O'Brien violated an order that required him to facilitate a relationship with D'Annunzio, or her view that the children demonstrated more animosity toward her as a result of her not being able to contact them. The trial court is not required to "comment upon every matter in evidence or declare acceptance or rejection of every position argued." *Baker*, 411 Mich at 583. And the "failure to address the myriad facts pertaining to a factor does not suggest that the relevant among them were overlooked." *Fletcher*, 447 Mich at 884.

In *Fletcher*, this Court held that even a "one-sided account of the facts" still "minimally satisfied the requirements of the court rules and case law." *Id.* at 883. There was hardly a one-sided review here. Rather, the trial court painstakingly reviewed all of the trial testimony in detail in its opinion, including the evidence presented by D'Annunzio. The trial court may have given the evidence against D'Annunzio more

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weight in the final analysis than the evidence in her favor, but that is simply a product of the fact that D'Annunzio's evidence was either self-serving, less relevant, or biased. D'Annunzio's disagreement with how it weighed the evidence and its credibility determinations does not mandate a reevaluation of this case by the trial court.

D'Annunzio also challenges the trial court's decision to discredit her testimony and its characterizations of some of her testimony as "wholly not credible" and "fantastical at best," among other things. As the statement of facts above demonstrates, the trial court had good reason for drawing these conclusions. D'Annunzio's testimonial recount of events—such as IRDO giggling while she was shaking her and merely taping the door with scotch tape—were contradicted by other evidence or third-party witnesses. See, *supra*, 14-15. And she regularly evaded questions or denied any recollection of her own actions until confronted with other evidence, such as a recording of her phone conversation with IRDO's 13-year-old friend about her conflict with IRDO. See, *supra*, 13-14. (See also Trial Ct Op, App 025a-033a.)

D'Annunzio's argument that the circuit court failed to consider O'Brien's alleged order violation and D'Annunzio's claim that the children showed increased animosity are equally without merit. Again, this Court does not mandate that a trial judge address every single item of evidence presented that pertains to the case. See *Fletcher*, 447 Mich at 884. And this evidence does not show that the record as a whole clearly preponderates against the circuit court's findings that D'Annunzio's own behavior and refusal to take responsibility are to blame for the children's emotional injuries and their frustrations with her.

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B. The circuit court properly considered the best-interest factors.

D'Annunzio specifically challenges the trial court's findings on five factors. A trial court, in deciding a child-custody dispute, "must make specific findings of fact regarding each of twelve factors that are to be taken into account in determining the best interests of the child." *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). The evidence does not clearly preponderate against the circuit court's findings.

D'Annunzio first contends that the trial court erred in finding that factor (a) "greatly favors" father. Factor (a) looks to "[t]he love, affection, and other emotional ties existing between the parties involved and the [children]." MCL 722.23(a). D'Annunzio suggests this decision was based solely on D'Annunzio's withholding of GADO's Xbox Live account information, but that is not accurate. In analyzing that factor, the circuit court said "it is also clear that mother's actions produced significant conflict and impacted the existing emotional ties between her and the children." (Trial Ct Op, App 059a.) Though the trial court specifically mentions the Xbox Live account as an example, it is not a reasonable interpretation of the opinion that this was the only action the circuit court was referring to, given that this example did not even involve IRDO, who was at the center of much of the conflict discussed in the opinion. D'Annunzio has therefore failed to point to any error in the analysis of this factor.

Factor (d) looks to the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). D'Annunzio attempts to argue that the children's animosity toward her

reflected that the children were not "stable" while in O'Brien's care. The premise of the argument is that the environment could not have been stable because there had been no progress toward reunification during the trial proceedings. This ignores the vast body of evidence pointing to D'Annunzio's actions as the cause for the rift between her and her children. D'Annunzio demonstrated erratic and abusive behavior toward her children that instilled fear in IRDO and drove her to run away from home multiple times. She also instilled resentment and anger in GADO through her treatment of IRDO and humiliation of him online. O'Brien did not. Accordingly, the trial court's findings were not against the great weight of the evidence.

Factor (e) looks to "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e). D'Annunzio argues that she and her ex-husband were in compliance with the divorce judgment that mandated that they sell their house. At the time of the trial, D'Annunzio had no idea where she would be living with the children. It was therefore not against the great weight of the evidence for the trial court to find that O'Brien, who has lived in the same home for years, offered a more permanent custodial home.

Factor (g) looks to "[t]he mental and physical health of the parties involved." MCL 722.23(g). D'Annunzio argues that the trial court erred by overlooking the testimony of her therapist who felt that she did not pose any kind of threat to her children. This factor, however, is not concerned with threats to the children but with mental health in general. The trial court did consider her therapist's view as well as that of Dr. Green, along with D'Annunzio's behavior "both inside and outside of therapeutic settings." (Trial Ct Op, App 061a.) The trial court

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is permitted to look at the behavior of the parties in weighing this factor. See *Streicher v Streicher*, 128 Mich App 5, 11; 339 NW2d 661 (1983) (the trial court looked to the testimony of numerous witnesses, not just experts, in determining that the plaintiff's erratic behavior weighed factor (g) in favor of the defendant). The evidence did not clearly preponderate against a finding D'Annunzio posed greater mental-health concerns than O'Brien.

Factor (j) looks to "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent." MCL 722.23(j). D'Annunzio argues that the trial court ignored evidence that D'Annunzio (1) invited O'Brien into her home for birthdays and holidays and (2) made efforts to include O'Brien during her parenting time. Further, D'Annunzio argues that O'Brien did not send her pictures of the children nor make the children send D'Annunzio a card on D'Annunzio's Mother's Day. Again, the failure to address these facts does not suggest they were not considered. *Fletcher*, 447 Mich at 884. Satisfying the review standard requires more than just pointing out what facts the trial court did not mention in its opinion. It requires a showing that the facts in her favor outweigh the facts against her.

D'Annunzio fails to address any of the facts against her, such as the undisputed facts that (1) she believes O'Brien is the source of all discord and (2) the children resent her accusations that O'Brien caused the rift with her, rather than recognizing that it was caused by her own actions. (6/18/2018 Trial Tr, App 952a.) The trial court's findings of fact on this factor are not against the great weight of the evidence.

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CONCLUSION AND REQUESTED RELIEF

Because there is no reversible error shown in the trial court's ultimate decision in January of 2019 to suspend D'Annunzio's parenting time and grant O'Brien full custody, the Court should deny leave to appeal.

Respectfully submitted,

Dated: February 19, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation pursuant to Administrative Order 2019-6. The brief contains 14,489 words of Century Schoolbook 13.5-point proportional type. The word processing software used to prepare this brief was Microsoft Word 2016.

Dated: February 19, 2021

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